United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
LESLIE A. BRADSHAW

77-2150

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES ex rel. LARRY C. MOSLEY,

Petitioner-Appellant,

vs

Docket No. 77-2150

HAROLD J. SMITH, Supt.,
Attica Correctional Facility,

Respondent-Appellee.

UNITED STATES ex rel. DORIS McNAIR,

Petitioner-Appellant,

vs

Docket No. 77-2151

FRANCES CLEMENT, Acting Supt.,
Bedford Hills Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of New York

REPLY BRIEF OF PETITIONERS-APPELLANTS

Dated: May 17, 1978.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FILED
MAY 18 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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D. PENALTIES IN OTHER JURISDICTIONS FOR NARCOTIC OFFENSES.
(pp. 96-102 in original brief)

While conceding that New York's penalties are the harshest in the nation, the Carmona majority found "little relevance" in the lesser penalties prescribed in all other states because of the much greater magnitude of the drug problem in the state of New York, the court noting, without citing any authority, that "New York City houses more than half of all the addicts in the entire United States." (slip op., at 2668).

This factual assumption is not supportable by available statistics. The National Institute on Drug Abuse of the U.S. Dept. of HEW recently released a Technical Paper on the prevalence of heroin use in the nation and in 24 major cities.[1]

The N.I.D.A. Technical Paper shows[2] that 7 other cities in 5 other states had a higher heroin addict population per capita than New York City in 1975, and that, except for Chicago, the same was true in 1973 when the new drug law was passed. Further, there is a wide disparity in the estimated number of heroin addicts between San Francisco, with 916 addicts per 100,000 people, and New York City, with 608 addicts per 100,000 people. The 8 cities with the highest per capita heroin addict population, in order, are:

1. San Francisco, Calif.
2. Los Angeles, Calif.
3. Phoenix, Ariz.
4. Detroit, Mich.
5. San Diego, Calif.
6. Chicago, Ill.
7. San Antonio, Tex.
8. N.Y.C.

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[1] [N.I.D.A. Technical Paper]. Philip H. Person, Jr., Robert L. Retka, & J. Arthur Woodward, "A Method for Estimating Heroin Use Prevalence", U.S. Dept. HEW, National Institute on Drug Abuse Technical Paper (Rockville, Md., DHEW Pub. No. (ADM) 77-439)(1977).

[2] N.I.D.A. Technical Paper, supra, p. 8.

Although New York City does have a larger absolute number of addicts (69,600) than any other city (Los Angeles having 60,000), New York state appears to have fewer addicts than California, with the two largest cities in New York having 71,800 addicts and the three largest cities in California having 100,200 addicts.[3]

Moreover, instead of housing more than half the addicts in the entire United States, as stated by the Carmona majority, New York City houses between 12¼ and 13½ per cent of the nation's estimated 522,000 to 559,000 addicts.[4]

It should also be noted that New York City is not indicative of the rest of the state. Buffalo, the state's second largest city, ranks 24th out of the 24 major cities reported for addicts per capita, and 23rd for the absolute number of addicts (2,200). Only Raleigh, N.C. has fewer addicts.[5]

New York has a serious drug problem, yes. But its problem is smaller per capita than that of 7 other cities and 5 other states, and hardly of such proportions to warrant disregarding penalties in any other state--one of the main criteria in determining cruel and unusual punishment issues--on the ground that "action of the states faced with drug problems of lesser magnitude are of little relevance."

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[3] N.I.D.A. Technical Paper, supra, p. 9.

[4] N.I.D.A. Technical Paper, supra, p. 9. The 1973 figures show N.Y.C. with 13½ to 14½ % of the national total.

[5] N.I.D.A. Technical Paper, supra, pp. 8-9.

F. EFFECT ON EXCESSIVENESS OF PAROLE BOARD'S POWERS
(REVIEW SHOULD BE OF MAXIMUM PENALTY OF LIFE)
(pp. 111-18 in original brief)

Concerning the Carmona panel majority's opinion that the constitutionality of the mandatory life term need not be decided because of the possibility of parole and discharge from parole (slip op. at 2665-66) we rely on our original brief and on Judge Oakes' dissent (slip op. at 2674-78).

The Attorney General's brief, at p. 32, also cites a Second Circuit case, U.S. v Fiore, in support of this proposition. However, that case did not decide that credits for good time and time served must be taken into account in judging the 8th Amendment validity of a 20-year sentence for selling heroin, but only rejected counsel's contention that such a sentence so credited would be unconstitutional.[1]

Further, the Attorney General quoted the Fiore case as giving the defendant little solace in the Brennan and Marshall opinions in the Furman case. However, the quoted opinions were subsequently adopted by the majority in the Gregg and Coker cases.[2]

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[1] United States v Fiore, 467 F2d 86, 89 (CA2, 1972), saying: "Counsel contends that a 20-year sentence without parole--subjecting appellant to at least 14 years in prison--is violative of the eighth amendment....This argument, too has been dealt with adversely by this court in the past."

[2] Id., at 89, nn. 8-9. Additionally, this quote from the Fiore case did not concern the 8th Amendment challenge, but was said with reference to the defendant's argument that, by repealing the no-parole provisions of the former law, Congress had indicated that the older statute was arbitrary, excessive, and unnecessary.

POINT 2

B(1). EXISTING REHABILITATION PROGRAMS.
(pp. 120-23 in original brief)

Considerable emphasis was given by the Carmona majority to it conclusion that the "vast majority" of addicts treated under New York's expensive treatment program (1967-73) were not cured, but in fact became recidivists.[1] The majority supported this conclusion by reference to the 1976 Annual Survey of American Law and to a law article by Hardt and Brooks. Neither citation supports the broad conclusion drawn.

To the contrary, as shown on pages 120-23 of our original brief, the New York methadone maintenance program had been working astoundingly well, with a dramatic lack of recidivism, and this fact was known by the New York legislature through its own commission reports.

The Hardt and Brooks law review article cited by the majority gives an opinion opposite from the majority's. It says that by 1972, the New York drug treatment program has begun a "turnabout in the hitherto steady growth of heroin addiction" and "to demonstrate a clear correlation between treatment and drop in arrest rate".[2]

The 1976 Annual Survey of American Law does say that the New York program had proved to be a colossal failure, with the vast majority of those who underwent treatment soon becoming recidivists.[3] However, the sole authority cited for this footnote to the article was page 77 of the Consumer Union's book, Licit and Illicit Drugs and page 18 of a bar journal article by Suffolk County Court Judge Signorelli.[3a]

[1] Carmona v Ward, supra, slip op., at 2663-64.

[2] Chester R. Hardt & Ruth Brooks, "Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas", 48 St. John's L Rev 48, 93 (1973).

[3] Steven C. Charen & John P. Colangelo, "Criminal Law", 1976 Annual Survey of American Law 313, 353, n. 268 (1977).

[3a] Ibid.

The Signorelli bar journal article cites no evidence, but states only that the Governor has admitted that the program has been a failure.[3b]

The reference on page 77 of Licit and Illicit Drugs to an 80% failure rate did not refer to the methadone maintenance program, but rather referred to psychological and sociological programs within the New York system.[4]

The 46 Dole-Nyswander methadone maintenance clinics in New York were found to be highly successful by the Consumer Union's Licit and Illicit Drugs.(1972).

Only 3% drop out of this program voluntarily. Another 16% are discharged involuntarily, among other reasons, for excessive use of any other drug, including alcohol, but none has been discharged for abuse of heroin.[5]

15% of the addicts had jobs upon admission to this program. Within 3 months, more than half were productively employed or attending school. After a year, and continuing over the 3½-year period studied, this proportion rose to nearly two-thirds.[6]

More importantly, the overwhelming majority of patients in this program, after years as criminals, were found to lead a law-abiding life on methadone maintenance. Prior to treatment, 91% had been in jail. A 1968 report showed that 88% had remained arrest-free since

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[4] Edward M. Brecher & the editors of Consumer Reports, Licit and Illicit Drugs; The Consumer Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana--including Caffeine, Nicotine, and Alcohol (Little, Brown & Co., Boston, 1972), pp. 77, 83.

[5] Licit and Illicit Drugs, supra, pp. 141-42.

[6] Id., pp. 144-46. The 1969-70 employment record of these ex-addicts was considered to be particularly impressive because it occurred during a period of high and rising nationwide unemployment. Id., p. 148.

[3b] Ernest L. Signorelli, "A Judicial Analysis and Critique of the New Drug and Sentencing Laws", 46 NYSBJ 9, 18 (1974).

entering the program, and only 5.6% were convicted. An independent evaluation unit in the Columbia University School of Public Health confirmed in 1969 and 1970 that arrest rates (including those not followed by convictions) had fallen from 6 per 100 man-years after the first year on methadone to 3/100 the second year to 2/100 the third year and 1/100 the fourth year.[7] Licit and Illicit Drugs points out that the 2 arrests per 100 man-years acheived by the third year of methadone maintenance is lower than the rate (2.5/100) for the United States population as a whole, including babies and the aged.[8]

These statistics are particularly impressive in view of the fact that 80% of the addicts admitted to the program stay on it without interruption for two or more years.[9] Success in these terms varies within narrow limits, from 70% to 90% for all kinds of groups, defined by sex, color, age, education, marital status, age of addiction, type of drug abuse, and length of drug abuse. For example, the success rate is:[10]

90% of those on heroin 5 years or less
77% of those on heroin more than 5 years
85% of those with 2 criminal convictions or fewer
72% of those with 3 or more criminal convictions
75% of those with history of alcohol abuse

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[7] Id., pp. 142-43.

[8] Id., p. 143.

[9] Id., p. 141.

[10] Id., pp. 150-51.

A 1974 report in Federal Probation, noting a "major reduction" in arrests[11] and crimes[12] during methadone treatment, particulized the types of crimes reduced:[13]

> "The impact of methadone treatment was to reduce sharply the frequency of charges of violations of the dangerous drug laws. Similarly, the charges of money crimes fell steeply, almost to the preaddiction level. Prostitution arrests fell sharply and did not appear at all in any of the records after methadone treatment had commenced. Misconduct and violence offenses were less often recorded during methadone treatment than during addiction. However, there was a slight increase in both gambling and minor offense categories."

An analysis of all the reports on methadone maintenance issued until 1973, while noting some statistical problems, said that "virtually all investigation lauded the effectiveness of methadone on the reduction of crime."[14]

The N.Y. Temporary State Commission to Evaluate the Drug Laws had reached the same conclusion in its reports to the legislature, as shown in our original brief.[15]

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[11] Paul Cushman, Jr., "Relationship Between Narcotic Addiction and Crime", 38 Federal Probation 38, 39-40 (1974).

[12] Id., at 42.

[13] Id., at 40. see also the statistical chart, at 41.

[14] Stephanie W. Greenberg & Freda Adler, "Crime and Addiction: An Empirical Analysis of the Literature, 1920-1973", 3 Contemporary Drug Problems 221, 249 (1974).

[15] Brief of Petitioners/Appellants, pp. 121-23.

POINT III

FAILURE TO APPEAL STATE CONVICTION TO U.S. SUPREME COURT IS NOT BAR TO FEDERAL HABEAS CORPUS.
(see Petitioners' Supplemental Brief)

The U.S. District Court for Massachusetts held early this year that federal habeas corpus, unlike a §1983 action, is not barred by application of the doctrine of res judicata (Preiser v Rodriguez, 411 US 475 (1973)) and is therefore not barred by the petitioner's failure to exercise her right of appeal to the U.S. Supreme Court from a state decision upholding the constitutionality of a state statute.[1]

The McCloskey case cited by the Attorney General (p. 38) was explicit that the exhaustion requirement does not bar federal habeas relief even where direct appeal to the U.S. Supreme Court is still open when the petition is filed.[2] The district court limited its discretion to dismiss the petition to those cases in which, at the time of dismissal, the remedy of direct review by the Supreme Court was "currently available",[3] which is not the case here. Discretion was exercised to require direct appeal, in McCloskey, because "petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim."[4]

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[1] Sylvander v New England Home for Little Wanderers, ___ F Supp ___, 4 FLR 2161 (DC Mass., Jan. 3, 1978).

[2] United States ex rel. Stevens v McCloskey, 239 F Supp 419, 422 (SD NY, 1965).

[3] Id., at 423.

[4] Ibid.

The Lawrence case, cited by the Attorney General (p. 42) does not support the argument that "as a matter of comity, it should be the Supreme Court, rather than this Court, which should properly overrule New York's highest court." In Lawrence, the federal habeas petition was dismissed because the U.S. Supreme Court had dismissed a direct appeal taken by the petitioner.[5] The 7th Circuit also expressed in that case its view that a federal district court ruling in an unrelated case(that a state statute was unconstitutional)is not binding on the state appellate courts.[6]

The cause and prejudice showing required by Wainwright v Sykes[7] concern waiver of state remedies such as bar review on the merits by the state courts, and is not relevant to the present case,where full review on the merits was had by both the trial and appellate levels of the state court system.

Principles of comity with the state courts has nothing to do with this case, since the court whose review was not sought is a federal--not a state--court.

The time lapse in Supreme Court review by virtue of this federal habeas presents no bar to review. It would be the same if no one had challenged the statute until now. Even more delay would be caused by

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[5] United States ex rel. Lawrence v Woods, 432 F2d 1072, 1074 (CA7, 1970), cert. den., 402 US 983 (1971).

[6] Id., at 1075-76.

[7] Wainwright v Sykes, 433 US 72 (1977).

now dismissing this proceeding and waiting for another defendant to begin an appellate challenge.

The procedure adopted in this case gives the Supreme Court the advantage of additional, varying court opinions on the validity of the drug sentencing laws peculiar to New York State, and increases the possibility of plenary review by that court.

A successful challenge of the law will not put New York to enormous unnecessary expense in retrying hundreds of prisoners convicted in the period since the Supreme Court could have decided this issue on direct appeal, as argued by the Attorney General (p. 41). Only re-sentencing would be required--a small price to pay to relieve hundreds of prisoners from a cruel and unusual sentence.

Dated: May 17, 1978.

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